No. 04-682

(2)

Supreme Court, U.S.
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In The Supreme Court of the United States

JIGNESHKUMAR PATEL,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, FORMERLY KNOWN AS IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

REKHA SHARMA-CRAWFORD
Sharma-Crawford, LLC
7208 West 80th, Ste. 202
Overland Park, Kansas 66204
(913) 385-9821

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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REPLY BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points raised in the Brief in Opposition.

I. The questions presented in this case do not rise or fall with the actions of a private attorney, but rather, they involve an alien's right to seek discretionary relief.

Respondent's sole focus on the actions of a private attorney serves only to minimize the questions raised before this Court. The actions of a private attorney are indeed consequential, however, the continued denial of the right to apply for discretionary relief was an independent and continuing violation. The issue presented before this Court is the right of an alien to seek discretionary relief irrespective of the outcome. Although the facts of Petitioner's case involved ineffective assistance of Counsel, it was not the sole issue raised on appeal to the Board of Immigration Appeals or the Fifth Circuit Court of Appeals.

Ultimately, the true merits of the Petitioner's right to seek discretionary relief have repeatedly gotten lost in the judicial, statutory, and regulatory Gordian Knot into which immigration law has been twisted.

Absent the intervention of this Court, the right to seek discretionary relief will continue to be wrongfully commingled with the right to that relief. Support for this premise is found squarely in Respondent's own failure to recognize this distinction in his reliance on numerous Circuit decisions that only support the lack of a constitutional right to the discretionary decision (Res. fn 2&3), and not the right to application.

II. The actions of a private attorney, as related to the right to seek discretionary relief, are contemplated within the Agency regulations, and an Agency's violation of its own regulations is a due process violation.

Petitioner filed a nearly 400 page Motion to Re-Open and Reconsider with the Board of Immigration Appeals. Contained within that Motion was the argument that Petitioner had discretionary relief available to him, which was not explored, at the Immigration Court level. The Motion asked that the case be reopened so that Petitioner could apply for such relief. The Board, in denying the Motion, never addressed the merits of the Motion and instead denied relief based on technical reasons. (Pet. App.12-14).

The Code of Federal Regulations, at 8 CFR §1003.2(c)(1) enumerate the duties of the Board of Immigration Appeals with respect to Motions to Re-Open where the individual seeks discretionary relief. The regulation indicates that:

> ...nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if *it appears that the alien's right to apply for such relief was fully explained to him* or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. (emphasis added)

While Respondent indicates that Petitioner failed to exhaust his remedies with regards to this issue, Petitioner respectfully submits that the regulations do not specify who must advise the alien of his rights. Thus, the failure of Petitioner's own Counsel is contemplated within the statute. The regulations require that a determination be made, by the BIA, and that the right to seek relief be protected.

Respondent claims that Petitioner has "not provided any case that has held that alleged omissions in the advice rendered by the alien's privately retained counsel....constitute a deprivation of liberty without due process", Petitioner submits that the purpose of the provisions relating to Motions to Re-Open, when applied incorrectly, provide a basis themselves. (Res. 8). This Court long ago recognized that where an agency fails to follow its own regulations, a due process violation has occurred. *Accardi v. Shaughnessy*, 347 US 260 (1954).

III. The Fifth Circuit denied jurisdiction based on 8 USC §1252(a)(2)(B)(ii) insofar as the relief sought was discretionary. The Court's reliance on this provision of law does not recognize the right to seek discretionary relief regardless of the outcome. The resolution of this question presents a split within the circuits.

The Fifth Circuit had before it the Immigration Judge's decision, the Board's decision affirming without opinion the Immigration Judge's decision, and the Board's decision denying Petitioner's Motion to Re-Open. The merits of the timely filed Motion to Re-open and Remand have never been addressed by the Board or the Circuit Court.

The Fifth Circuit declined to examine the merits of the Motion to Re-Open and Remand because it concluded that, since contained within the Motion was a request for discretionary relief, the Court lacked jurisdiction. This holding is contrary to the Seventh Circuit in *Chowdhury v. INS*, 241 F3rd 848 (7th Cir. 2001). In this case the Seventh Circuit recognized that there was a right to have a Motion to Re-Open "heard on its merits by the Board". In reaching this conclusion, the Seventh Circuit did not divest themselves of jurisdiction despite the underlying relief sought being

discretionary. Thus, Respondent's claims of a lack of a Circuit split is without merit.

Respondent incorrectly states that *Patel v. Ashcroft*, 375 F.3d 693 (8th Cir. 2004) does not create a further circuit split. The Eighth Circuit made no comment as to jurisdiction because it accepted jurisdiction. Obviously, the Court's willingness to hear and decide the matter indicates the Court's acknowledgement that it had jurisdiction.

Respondent's next claim that *Nakamoto v. Ashcroft*, 363 F.3rd 874 (9th Cir. 2004) did not create a Circuit split, is also simply wrong. The Fifth Circuit, themselves recognized that *Nakamoto* supported Petitioner's claims. The Fifth Circuit, however, declined to accept jurisdiction because they found that since 8 USC §1252 denied them partial jurisdiction, the issues raised by Petitioner as it related to *Nakamoto* were immaterial.

Respondent's attempt to point out that *United States v. Torres*, 383 F. 3d 92 (3rd Cir. 2004) and *United States v Roque-Espinoza*, 338 F.3d 724 (7th Cir. 2003) support the Fifth Circuit's holding in this matter, is in error. Actually, both *Torres* and *Roque-Espinoza* Courts analyze the same Supreme Court Case, *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11-15 (U.S., 1979) and arrive at a wholly different conclusion regarding the right to seek discretionary relief. That difference is acknowledged by the *Torres* Court in their decision. *See Torres* n. 15.

Finally Respondent seeks to disclaim this Court's analysis in *INS v. St Cyr,* 533 U.S. 289 (2001). Relief under INA §212 (c) is discretionary. This Court, in granting St Cyr relief, held that the discretionary nature of that relief did "not affect the propriety of our conclusion." It is that analysis

which supports Petitioner's contention that he, too, had an interest in at least being able to seek his discretionary relief.

CONCLUSION

The difference between the right to seek discretionary relief and denial of such a right can be grave. It is as this Honorable Court so clearly recognized the difference between possible deportation and probable, or in this case, absolute deportation. Given the human tragedy that is guaranteed in the simple act of denying an opportunity this Court should grant Certiorari and resolve the legal conflict.

Respectfully submitted,

REKHA SHARMA-CRAWFORD
By Rekha Sharma-Crawford
Kansas Bar No. 16531
7208 W. 80th, Ste. 202
Overland park, KS 66204
(913) 385-9821, FAX (913) 385-9964
ATTORNEY FOR JIGNESHKUMAR PATEL